Supreme Court, U.S.
FILED
AUG 20 1992
OFFICE OF THE CLERK

92-340

No. _____

In The

Supreme Court of the United States

October Term, 1992

RESALE MOBILE HOMES, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Must applicable state law be used to determine when an accrual basis taxpayer's right to income becomes fixed for purposes of applying the all-events test?

II. In applying the all-events test, can the amount of income deemed earned by an accrual basis taxpayer be determined with reasonable accuracy if the calculation is based solely on a mathematical amortization schedule instead of empirical statistical data?

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PETITION FOR A WRIT OF CERTIORARI

Resale Mobile Homes, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 965 F.2d 818 (10th Cir. 1992). The opinion of the United States Tax Court (App., *infra*, 16a-31a) is reported at 91 T.C. 1085 (1988).

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

FEDERAL STATUTORY AND REGULATORY PROVISIONS INVOLVED

26 U.S.C. Section 446(a) provides as follows:

> GENERAL RULE. – Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.

26 U.S.C. Section 446(b) provides as follows:

> EXCEPTIONS. – If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary, does clearly reflect income.

26 U.S.C. Section 451(a) provides as follows:

> GENERAL RULE. – The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period.

26 C.F.R. Section 1.446-1(c)(ii) provides, in pertinent part, as follows:

> ACCRUAL METHOD. Generally, under an accrual method, income is to be included for the taxable year when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy.

26 C.F.R. Section 1.451-1(a) provides, in pertinent part, as follows:

> GENERAL RULE. Gains, profits, and income are to be included in gross income for the taxable year in which they are actually or
>
> constructively received by the taxpayer unless includible for a different year in accordance with the taxpayer's method of accounting. Under an accrual method of accounting, income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy.

STATEMENT OF THE CASE

Resale Mobile Homes, Inc., (taxpayer) is in the business of selling new and used mobile homes at retail. When taxpayer sells a home on credit, the purchaser executes an installment note which is referred to in the industry as consumer paper. The consumer paper evidences the purchaser's obligation to pay the balance due for the mobile home. Contemporaneously with the sale of

the mobile home to the purchaser, taxpayer sells the consumer paper to a finance company.

When the finance company purchases consumer paper from taxpayer, the finance company pays taxpayer the principal amount owed by the purchaser pursuant to the terms of the consumer paper. If the interest rate charged in the consumer paper exceeds the rate being charged by the finance company, the finance company agrees to pay taxpayer a portion of the excess interest that could be earned by the finance company (participation interest), if and to the extent that any such excess interest is actually collected by the finance company.

Applicable Colorado law as enacted in 1975, requires that installment obligations like consumer paper provide for interest to be calculated on a simple interest basis, thus making the portion of each payment attributable to principal and interest a direct function of when a payment is received.

Under the contractual relationship with taxpayer, once the finance company collects a payment, it calculates the amount of that payment attributable to interest and principal and then determines what portion, if any, of the interest collected is participation interest to which taxpayer is entitled. Based on the contractual arrangement between taxpayer and the finance companies, taxpayer is entitled to participate in the interest portion of a payment only if (i) the consumer makes a payment, (ii) the payment is timely made, and (iii) the interest rate charged in the consumer paper exceeds the interest rate charged by the finance company when it purchased the consumer paper. If a consumer fails to make a payment,

taxpayer is entitled to no participation interest. The amount of participation interest to which taxpayer becomes entitled is in part a function of when the finance company collects a payment from the purchaser, which can not be accurately determined when the consumer paper is sold by the taxpayer.

The taxpayer reported participation interest as taxable income in the year the finance companies collected payments from the purchasers. The Internal Revenue Service disallowed such treatment and assessed tax deficiencies for the applicable years. Taxpayer petitioned the United States Tax Court for relief.

The United States Tax Court held that taxpayer's treatment for tax purposes was incorrect and required that all participation interest must be reported as income at the time the consumer paper is sold to the finance companies. While the Tax Court recognized that neither the total amount of interest to be earned under the consumer paper nor the participation interest to be earned by taxpayer could be determined exactly in advance, the Court nevertheless concluded that taxpayer's right to participation interest became fixed when it sold consumer paper to the finance companies since both the amount of interest to be earned on each contract and the participation interest to be earned by taxpayer could be reasonably estimated by using an amortization schedule which assumed that all required payments would be duly made.

The Tenth Circuit Court of Appeals affirmed the United States Tax Court agreeing with what it perceived as the Tax Court's opinion that taxpayer's right to receive

participation interest became fixed when the taxpayer sold the consumer paper to the finance company. The Tenth Circuit recognized that taxpayer's right to participation interest was contingent upon any prepayments or defaults, and the time of payment by the purchaser, but agreed with the Tax Court and concluded that taxpayer was an accrual basis taxpayer whose right to participation interest accrued and became fixed when the consumer paper was sold.

REASONS FOR GRANTING THE PETITION

I.

The Tenth Circuit held that the first part of the two-part all-events test, whether taxpayer had a fixed right to the income, was satisfied when taxpayer sold the consumer paper to the finance companies. The Tenth Circuit's holding is incorrect and inconsistent with prior decisions of this Court in that the Tenth Circuit also concluded that taxpayer's agreements with the finance companies "may be characterized as technically creating a condition precedent. . . . " App., *infra*, 13a.

The Tenth Circuit was no doubt responding to taxpayer's argument on brief that under long established Colorado contract law, a provision in a contract requiring payment to one party conditional upon a second party's receipt of payment from a third party is a valid condition precedent to an obligation becoming fixed so that in the event payment is not made by the third party, the second party has no obligation or liability to pay the first party. *Orman v. Ryan*, 55 P. 168, 25 Colo. 383 (Colo. 1897). In

Orman, plaintiffs contracted with defendants, who were themselves subcontractors, to do certain work on a railroad roadbed. Payments were to be made by defendants to plaintiffs of a percent of the monthly estimate of work completed as soon after the 15th of each month as defendants, "shall have received the money for said work from the Pacific Contract Company," with the balance being payable by defendants to plaintiffs as soon as defendants received "a final estimate, and the full amount of money due them for said work from the Pacific Contract Company." The court held that defendants were liable to plaintiffs only in the event defendants collected the money from the contract company. It was not just a question of when the obligation was to become payable, but if the obligation ever became fixed.

The Tenth Circuit's conclusion that taxpayer had a fixed right to the participation interest while at the same time recognizing the presence of a valid condition precedent is inconsistent and is in conflict with the long standing precedent of this Court that "in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute." *Aquilino v. United States*, 363 U.S. 509, 513 (1960), *quoting Morgan v. Commissioner*, 309 U.S. 78, 82 (1940).

In an opinion by then Chief Justice Warren, this Court resisted suggestions that the definition of a taxpayer's property interests should be governed by federal law and concluded that such an approach would be unsound "because it ignores the long-established role that the states have played in creating property interests and places upon the courts the task of attempting to

ascertain a taxpayer's property rights under an undefined rule of federal law." *Aquilino*, 363 U.S. at 513 n.3.

This Court, in *United States v. General Dynamics Corp.*, 481 U.S. 239 (1987), recognized that the actual contractual relationship between the parties is determinative for purposes of deciding if the all-events test has been satisfied. *See also Commissioner v. Hansen*, 360 U.S. 446 (1959). In an opinion by Justice Marshall, this Court held that General Dynamics was not entitled to a medical expense deduction because all events necessary to fix the taxpayer's liability had not occurred.

General Dynamics was an accrual basis taxpayer which provided medical benefits to its employees. General Dynamics deducted medical expenses to be paid on behalf of employees who had received covered medical care.

This Court held that the medical deduction was premature because General Dynamics' liability for the expense was not fixed until a health-expense-benefits claim form had been received. This Court concluded that, as a matter of law, the filing of a claim was necessary to create liability. *General Dynamics*, 481 U.S. at 244 n.4.

Under the contractual relationship between General Dynamics and its employees, a person covered by a plan could obtain payment for medical services only by filling out and submitting a health-expense-benefits claim form. Employees were informed that submission of satisfactory proof of the charges was necessary to obtain payment. *Id.* at 244.

This Court recognized that the filing of the claim was a true condition precedent to General Dynamics' liability. *Id.* at 244 n.5. General Dynamics and its employees exercised their freedom to contract the circumstances under which General Dynamics was liable for the medical expenses of its employees. The parties agreed that the corporation's payment of medical expense was contingent upon the filing of a claim form. Had the relative rights of the parties under the agreement needed interpreting, applicable state law would have controlled.

This Court recognized the presence of a valid condition precedent in the *General Dynamics* case and applied the state law mandated conclusion to the federal revenue law that an obligation must be fixed before it is currently deductible. This Court then concluded that because the obligation was not fixed, the all-events test was not satisfied and the deduction did not accrue.

Federal revenue law codified at 26 U.S.C. §§ 446(a), 451(a) and applicable regulatory provisions contained at 26 C.F.R. §§ 1.446-1(C)(ii), 1.451-1(a) provide that under the accrual method of accounting, income is includible in gross income when all the events have occurred which fix the right to receive such income.

Per this Court's precedent, taxpayer's right, or lack thereof, is a direct function of state law to avoid placing upon courts the task of attempting to ascertain a taxpayer's rights under an undefined rule of federal law.

The Tenth Circuit's decision in the instant case results in the very problem that this Court was guarding against when it mandated that a taxpayer's rights in property be decided under state law.

The Tenth Circuit states that taxpayer's right to receive participation interest was firmly established upon the sale of the consumer paper to the finance company but fails to adequately justify such conclusion because it is based on an undefined rule of federal law. The Tenth Circuit states that the finance company was "legally obligated" to pay the interest and that it agrees with the Tax Court which concluded that the finance companies "intended" to share the interest with taxpayer. App., *infra*, 10a, 12a.

The Tenth Circuit recognized that the taxpayer's right to receive income was the key consideration and that under state law a valid condition precedent was present. The Tenth Circuit's role was to examine taxpayer's rights under state law and having concluded what such rights, or lack thereof, were, apply the result as concluded under state law to the federal revenue act. The Tenth Circuit could have examined taxpayer's contracts with the finance companies and concluded that under state law, no valid condition precedent was present. To the contrary, the Tenth Circuit expressly recognized a valid condition precedent but then looked to a nebulous body of federal law to conclude that a right to the income was present thus ignoring applicable state law.

II.

In determining whether the second part of the two-part all-events test, whether the amount of income to be accrued can be determined with reasonable accuracy, was satisfied, the Tenth Circuit affirmed the United States Tax Court. The Tax Court found that the participation interest could be reasonably estimated by using an amortization

schedule which assumed that all required payments would be made every 30 days. App., *infra*, 22a.

The first part of the all-events test, whether a right to income or obligation for an expense is fixed, serves as a threshold which, if not met, renders moot a consideration of whether the amount of income or expense can be determined with reasonable accuracy. This Court concluded that a "liability must first be firmly established." *General Dynamics*, 481 U.S. at 243.

In the case at issue, even if the first part of the all-events test was satisfied, the Tenth Circuit's basis for concluding that the amount of participation interest could be determined in advance with reasonable accuracy is nevertheless incorrect because the estimated amount of participation interest to be earned was based solely on a theoretical amortization schedule and not empirical data.

In the instant case, the Tenth Circuit concluded that the amount of participation interest could be determined with reasonable accuracy based solely on an amortization schedule which assumes that all required payments will be made every 30 days without exception. App., *infra*, 13a. Such assumptions yield inaccurate results as the Tenth Circuit readily admitted. The Tenth Circuit opinion states that "[c]ertainly some payments will be early and others late but on the aggregate petitioner should be able to reasonably estimate interest amounts in advance." App., *infra*, 14a.

Defining the reasonable accuracy of a potential income accrual using such imprecise assumptions violates standards set forth by this Court designed to safeguard the integrity of accrual method accounting for tax purposes.

CONCLUSION

The Tenth Circuit's decision ignored the rulings of this Court on the respective roles of state and federal law in applying federal revenue acts, specifically the long-established role committed to the states in creating and interpreting rights to property. The Tenth Circuit improperly relied on theoretical assumptions instead of empirical data to determine if the amount of accrued income could be calculated in advance with reasonable accuracy as required by the all-events test.

If the analysis of the Tenth Circuit is allowed to stand, it will radically alter the basis on which accrual basis taxpayers recognize income and accrue expense since the all-events test will be applied based on nebulous federal legal standards instead of recognized local law.

Based on the foregoing, it is requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RESALE MOBILE HOMES, INC., Petitioner-Appellant,	)	
v.	)	No. 90-9015
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	)	(Filed May 22, 1992)

Appeal from the United States Tax Court
No. 39593-84

Robert Shaiman, Lohf, Shaiman & Ross (John D. Moats and Mark H. Scheffel, John D. Moats & Associates, with him, on the briefs), Denver, Colo. for Petitioner-Appellant.

Steven W. Parks, Atty., Tax Div. (Shirley D. Peterson, Asst. Atty. Gen., Gary R. Allen and David English Carmack, Attys., Tax Div., with him, on the brief), Dept. of Justice, Washington, D.C., for Respondent-Appellee.

Before LOGAN and SEYMOUR, Circuit Judges, and WINDER, District Judge.*

LOGAN, Circuit Judge.

Petitioner Resale Mobile Homes, Inc., appeals a decision of the Tax Court affirming the Commissioner of Internal Revenue's determination of deficiencies in petitioner's federal income tax returns for the years 1978-1981. The Tax Court, in its opinion reported as *Resale Mobile Homes, Inc.*, 91 T.C. 1085 (1988), found that petitioner must report anticipated participation interest from consumer installment sales contracts it sold to finance companies in the tax year those contracts were sold. Petitioner argues that the Tax Court incorrectly applied the applicable "all events" test; it also contends the Tax Court improperly increased the deficiency for a 1980 tax refund of $9,302. This court has jurisdiction under 26 U.S.C. (I.R.C.) § 7482(a)(1).

I

The Tax Court carefully and accurately outlined the facts of this case, *see* 91 T.C. at 1086-92, and we repeat

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* The Honorable David K. Winder, United States District Judge for the District of Utah, sitting by designation.

here only a brief synopsis. We accept the Tax Court's findings of fact, which were largely stipulated or uncontested.

In all relevant years petitioner was in the business of selling mobile homes. Typically, when a purchaser bought one of petitioner's mobile homes on credit, petitioner immediately sold the retail sales contract (consumer paper) to one of two finance companies, Midland Federal Savings & Loan Association of Denver (Midland) or Advance Mortgage Co. (Advance) (collectively "finance companies"). As consideration petitioner received from the finance companies the principal or face amount stated in the consumer paper plus the right to receive a portion of the interest rate charged to the purchaser (participation interest). 91 T.C. at 1086-87. Petitioner is an accrual basis taxpayer, and before the tax years at issue it reported the participation interest as accrued income on its tax return for the year in which the consumer paper was sold to finance companies.

Also under petitioner's arrangements with the finance companies before 1975, the participation interest was credited to reserve accounts on the finance companies' books at the time these companies acquired the consumer paper from petitioner.[1] Amounts in these reserve accounts were held back by the finance companies as collateral for certain warranties, and when the reserve accounts reached specified levels payments were

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[1] Midland retained the whole amount of participation interest in the reserve account; Advance retained 50% of the participation interest in the reserve account and paid the other 50% to petitioner. 91 T.C. at 1088.

made to petitioner. If customers defaulted or prepaid on the consumer paper, and therefore did not pay the full amount of the interest specified in the paper, the finance companies calculated petitioner's unearned participation interest and deducted that amount from the reserve accounts. *Id.* at 1088. Petitioner would then claim a tax deduction for the participation interest, which it had previously reported, in the year of the default or prepayment. *Id.*

In 1975, responding to a change in Colorado law making interest amounts in the event of early or late payments more difficult to forecast precisely in any given contract,[2] petitioner and the finance companies changed their agreements. Under the new Midland agreement Midland did not keep a reserve account, although it had the option of doing so.[3] Instead of a reserve account, the

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[2] Colo. Rev. Stat. § 5-2-210 was amended in 1975 to prohibit the use of the "Rule of 78's" as a method for calculating the balance due on consumer paper in event of prepayment. Instead, the amended statute required use of simple interest in such calculations. 91 T.C. at 1089; *see* Colo. Rev. Stat. § 5-2-210; *see also* I R. doc. 6-A, ¶35.

[3] The relevant provisions of the 1975 contract with Midland provides:

> 4. Midland's compensation to Dealer shall be as follows: the difference between Midland's buy rate and the Annual Percentage Rate charged the purchaser shall be called the "Dealer Participation Rate."
>
> . . . .

(Continued on following page)

interest due petitioner was calculated after the obligor on the consumer paper made the monthly payment and it was then sent to petitioner. *Id.* at 1090. Although the new Advance agreement contemplated that Advance would continue to maintain a reserve account, petitioner asserts Advance never maintained one. We need not resolve this factual dispute; it was not determinative of the Tax Court's opinion, *see* 91 T.C. at 1094, nor is it determinative of this appeal.[4] Allegedly because of these new

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> b. On all consumer paper discounted by Midland on or after October 28, 1975, Midland shall pay Dealer monthly as follows; upon Midland's receipt of monthly payments from purchasers. Midland shall pay to Dealer an amount equivalent to a percentage of the simple interest earned on that consumer paper purchased from Dealer on which payments have been received. Such amount shall be computed according to the formula set forth in the form attached and labeled Exhibit B. This amount shall be the difference between Midland's buy rate and the rate charged purchaser. Midland's buy rate shall be indicated in the approval summary for each individual transaction. Dealer shall from time to time be furnished guidelines for Midland's buy rates; the rate on any individual transaction shall be determined by Midland.
>
> c. *At its option,* Midland may require Dealer to maintain a Dealer Reserve Account . . . on all paper discounted on or after October 28, 1975. Should Midland exercise this option, paragraph 4(b) as set forth herein shall be inapplicable to Dealer so long as such Dealer Reserve Account shall be maintained.

III R. ex. 17-Q, ¶4 (emphasis added).

[4] One of petitioner's employees testified that there was no holdback by Advance. II R. 77-78. Petitioner apparently

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agreements, petitioner ceased reporting the total participation interest as accrued income on its tax returns for the

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equates "holdback" in context to mean reserve account. The clear language of the agreement, on the other hand, clearly anticipates a reserve account. The agreement states:

> Dealer is engaged in the business of selling mobile homes at retail and, in the ordinary course of Dealer's business, originates Retail Installment Sales Contracts ("Contracts") executed by customers of Dealer ("Buyers") to finance the purchase at retail of mobile homes from Dealer. Dealer wishes to sell such Contracts to Advance, and Advance is willing to purchase such Contracts, on the following terms and conditions:
>
> . . . .
>
> 4. Advance shall retain on deposit and under Advance's sole control, a Dealer Reserve account to which shall be credited an amount to be determined by computing the "Reserve Rate" which is the difference between the interest rate charged by the Dealer on the contract and the existing corporate retention rate charged by Advance. The "Reserve Rate" (not to exceed 2%) shall then be multiplied by the term of the contract (not to exceed 10 years). The resulting percentage shall be applied to the unpaid cash price plus insurance charges and other fees. The resulting "Base Reserve Amount" shall be the total amount of money credited to the Dealer Reserve account for that particular contract and shall be paid to the Dealer only "as earned" during the entire term of the contract. The amounts retained in the reserve account need not be segregated or kept in a separate fund, and no interest shall be payable thereon. Dealer shall have no right to sell, assign, transfer, or convey Dealer's interest in the reserve account or any part thereof. The Dealer Reserve is established as security

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years 1978-1981, but instead reported the income only when checks were received from the finance companies. *Id.* The Commissioner issued notices of deficiency based upon its determination that petitioner had to report as accrued income a reasonable estimate of all the participation interest in the year the consumer paper was sold to the finance companies. The Tax Court upheld the Commissioner's determination and its handling of the 1980 tax refund claim. Petitioner appealed to this court.

II

A

The Tax Court's conclusions of law are reviewed de novo by this court, while the Tax Court's findings of fact are reviewed under a clearly erroneous standard. *Love Box Co., Inc. v. Commissioner,* 842 F.2d 1213, 1215 (10th Cir.), *cert. denied,* 488 U.S. 820, 109 S.Ct. 62, 102 L.Ed.2d 40 (1988); *see also* I.R.C. § 7482(a)(1) (court of appeals to review tax court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury"); *National Collegiate Athletic Ass'n v. Commissioner,* 914 F.2d 1417, 1420 (10th Cir. 1990) (discussing standard of review for tax court decisions).

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for: (a) the performance of all of Dealer's obligations hereunder; (b) the performance of all of Dealer's obligations under all Contracts purchased by Advance; (c) the payment of any other indebtedness owed by Dealer to Advance; and (d) the payment of prepayment rebates to Buyers.

III R. ex. 18-R.

The issue "[w]hether a taxpayer has satisfied the 'all events' test is a question of law" subject to de novo review. *Challenge Publications, Inc. v. Commissioner*, 845 F.2d 1541, 1543 (9th Cir. 1988).

In this area of the tax law, however, the Commissioner is granted by statute "broad powers in determining whether accounting methods used by a taxpayer clearly reflect income," and the Commissioner "may require that 'computation shall be made in accordance with such method as in [his] opinion . . . does clearly reflect the income.' " *Commissioner v. Hansen*, 360 U.S. 446, 467, 79 S.Ct. 1270, 1282, 3 L.Ed.2d 1360 (1959) (quoting 26 U.S.C. § 41 (1952)) (brackets in original); *see also United States v. Hughes Properties, Inc.*, 476 U.S. 593, 603, 106 S.Ct. 2092, 2098, 90 L.Ed.2d 569 (1986) (Commissioner has broad discretion, citing 26 U.S.C. § 446(b) and *Hansen*). The Internal Revenue Code states "[i]f no method of accounting has been regularly used by the taxpayer, *or if the method used does not clearly reflect income*, the computation of taxable income shall be made under such method as, in the opinion of the Secretary, does clearly reflect income." I.R.C. § 446(b) (emphasis added.)[5] Moreover, "[t]he term 'method of accounting' includes not only the overall method of accounting of the taxpayer but also the accounting treatment of any item." Treas. Reg. § 1.446-1(a)(1); *accord Hughes*, 476 U.S. at 603, 106 S.Ct. at 2098 (citing § 1.446-1(a)(1)); *Jerry Lipps, Inc.*, 59 T.C.M. (CCH) 849, 865-66 (1990) (same).

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[5] Section 446(b) is the successor to the § 41 quoted in *Hansen*.

Petitioner at all relevant times was an accrual basis taxpayer. *See* I.R.C. § 446(c)(2). The key to the accrual method of accounting is the well recognized "all events" test. "Generally, under an accrual method, income is to be included for the taxable year when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy." Treas. Reg. § 1.446-1(c)(ii); *accord* Treas. Reg. § 1.451-1(a). Under this two-part analysis, income is accrued and must be reported when (1) the taxpayer has a fixed right to receive the income, and (2) the income can be determined with reasonable accuracy. *See Kent Homes, Inc. v. United States*, 512 F.2d 395, 397 (10th Cir. 1975). We now apply this two-part analysis to the instant appeal.

B

The law is firmly established that under the accrual method the right to receive income, not actual receipt of income, is controlling. *E.g., Spring City Foundry Co. v. Commissioner*, 292 U.S. 182, 184-85, 54 S.Ct. 644, 645, 78 L.Ed. 1200 (1934). Moreover, the fact that a taxpayer cannot presently compel payment of the money is not controlling. *Hansen*, 360 U.S. at 464, 79 S.Ct. at 1280.

The Tax Court found that petitioner "acquired a fixed right to receive the participation interest when it sold the consumer paper to finance companies. While petitioner could not compel finance companies to immediately pay over the participation interest, such is not the key to the accrual of income." 91 T.C. at 1094. The Tax Court believed *Hansen* to be controlling. In *Hansen*, money held back in reserve accounts to guarantee payment of dealers' contingent liabilities was deemed accrued income. *Id.* at

467-68, 79 S.Ct. at 1282. Courts have read *Hansen* to require that participation interest, held back in reserve accounts to guarantee payment of contingent liabilities, be reported as accrued income. *E.g., Shapiro v. Commissioner,* 295 F.2d 306 (9th Cir. 1961), *cert. denied,* 369 U.S. 829, 82 S.Ct. 844, 7 L.Ed.2d 794 (1962); *General Gas Corp. v. Commissioner,* 293 F.2d 35 (5th Cir. 1961), *cert. denied,* 369 U.S. 816, 82 S.Ct. 826, 7 L.Ed.2d 783 (1962); *Morgan v. Commissioner,* 277 F.2d 152 (9th Cir. 1960); *Klimate Master, Inc.,* 42 T.C.M. (CCH) 85 (1981); *see also Wiley v. Commissioner,* 266 F.2d 48 (6th Cir.), *cert. denied,* 361 U.S. 831, 80 S.Ct. 80, 4 L.Ed.2d 73 (1959) (decided pre-*Hansen*).

Although petitioner previously reported participation interest as accrued income in the year the consumer paper was sold to finance companies, it now argues that under the new agreements with the finance companies *Hansen* and its progeny are not controlling. Petitioner asserts that no money is paid into reserve accounts, and that petitioner has no fixed right to receive the participation interest until the mobile home purchasers make their required monthly payments on the consumer paper. According to petitioner, a purchaser's monthly payment is a condition precedent to any obligation to pay petitioner participation interest.

As to the issue of reserve accounts we agree with the Tax Court; whether the finance companies maintained reserve accounts under the new agreements is of no moment. The Tax Court reasoned as follows:

> The finance companies intended to share the interest paid by the mobile home purchasers with petitioner; however, they obviously were unwilling to share interest which they did not receive due to the purchaser's default or prepayment. Economically, holding back payment

> to petitioner until such time as participation interest was received by the finance company served the same purpose as the creation of a reserve account.

91 T.C. at 1094. Indeed, reserve accounts are simply bookkeeping entries, and "[o]n questions concerning the taxability of income, we are to be guided by facts and not by bookkeeping entries." *Commissioner v. North Jersey Title Ins. Co.*, 79 F.2d 492, 493 (3d Cir. 1935). We heed the Supreme Court's directive "that the incidence of taxation depends upon the substance, not the form, of the transaction." *Hansen*, 360 U.S. at 461, 79 S.Ct. at 1279; *accord Riley v. Commissioner*, 649 F.2d 768, 773 (10th Cir. 1981) ("[T]he incidence of taxation depends on the substance of a transaction, and the government may look at the realities of a transaction to determine its tax consequences, despite the form.").

Furthermore, the 1975 contracts between petitioner and the finance companies gave the finance companies the option of establishing dealer reserve accounts. *See supra* notes 3-4. The option in the Midland agreement and the practice with Advance are evidence that operation without reserve accounts was in substance no different from operating with reserve accounts from petitioner's point of view. The internal procedures of the finance companies cannot determine how petitioner should report its taxable income.

In support of its argument that it had no fixed right to receive the participation interest until the mobile home purchasers made their monthly interest payments, petitioner relies upon *United States v. General Dynamics Corp.*, 481 U.S. 239, 107 S.Ct. 1732, 95 L.Ed.2d 226 (1987). That case held that under the "all events" test, a "liability must

be firmly established" and not a mere forecast based upon actuarial data before a taxpayer can deduct an anticipated expense. *Id.* at 243, 107 S.Ct. at 1736.

We agree with the Tax Court that petitioner's right to receive participation interest was firmly established upon sale of the consumer paper to a finance company. The finance company was legally obligated to pay the participation interest to petitioner when it bought the consumer paper. Although duty of the finance company to make payment was deferred until it received payment from the purchasers, both the mobile home purchasers and the finance companies were obligated to make their respective payments. Petitioner was not required to take any additional action in order to receive the participation interest.

Although the exact amounts that petitioner would eventually receive varied based upon time of payment, prepayments and defaults, similar contingencies existed under *Hansen*. *See Hansen*, 360 U.S. at 459 & n. 8, 465, 79 S.Ct. at 1278 & n. 8, 1281; *see also Morgan*, 277 F.2d at 153 (actual payments subject to debits for prepayments); *Wiley*, 266 F.2d at 49 (same); *Shapiro*, 295 F.2d at 307 (actual payments subject to debits for prepayments and defaults); *Klimate Master, Inc.*, 42 T.C.M. (CCH) at 89 (same). We agree with the Tax Court that "[a]n accrual basis taxpayer must report income in the year the right to such income accrues, despite the necessity for mathematical computations or ministerial acts." 91 T.C. at 1095 (citing *George K. Herman Chevrolet, Inc.*, 39 T.C. 846, 850 (1963)); *Continental Illinois Corp.*, 61 T.C.M. (CCH) 1916, 1946 (1991) (same); *see also Continental Tie & Lumber Co. v. United States*, 286 U.S. 290, 295-97, 52 S.Ct. 529, 530-31, 76 L.Ed. 1111 (1932) (must report accrued income though must estimate amount and ministerial acts remain).

The language of the 1975 agreement with Midland may be characterized as technically creating a condition precedent, but in substance it is no different from the prior agreements with reserve accounts; petitioner still will receive participation interest less any amount of interest not actually paid due to prepayment or default. That the participation interest is to be paid petitioner when interest is paid to the finance company in reality is an issue of timing and does not make the payment of participation interest less certain or genuinely conditional. Artful drafting cannot defeat the "all events" test. A simple word change without a change in substance cannot alter the income reporting requirements. *See Hansen*, 360 U.S. at 467, 79 S.Ct. at 1282; *see also id.* at 461, 79 S.Ct. at 1279 (substance not form is determinative); *Riley*, 649 F.2d at 773 (same). We agree with the Tax Court that upon the sale of the consumer paper to finance companies, petitioner had a fixed right to receive the participation interest.

C

Next, we must consider the Tax Court's finding that the amount of income petitioner would receive from the participation interest could be determined with reasonable accuracy. The Tax Court found that "both the amount of interest to be earned on each individual contract of new consumer paper and the participation interest could be reasonably estimated by using an amortization schedule which assumed that all required payments would be made every 30 days." 91 T.C. at 1089-90. Petitioner itself stipulated to that effect. I R. doc. 6A, ¶42. In fact, petitioner kept records reflecting such calculation. *See* III R. ex. 23-W, 24-X, 25-Y; II R. 102-09. Before the tax years at

issue petitioner apparently had no trouble calculating the participation interest to include in its accrued income. The only difference under the amended Colorado law and new agreements is that participation interest may vary based on whether mobile home purchasers make their monthly payments on time, early, or late. Certainly some payments will be early and others late but on the aggregate petitioner should be able to reasonably estimate interest amounts in advance. Moreover, as the Tax Court noted, when "an amount of income is properly accrued on the basis of a reasonable estimate and the exact amount is later determined, any difference may be included in income or deducted, as appropriate, in the year in which the correct amount is determined." 91 T.C. at 1095 (citing Treas. Reg. § 1.451-1(a); *Continental Tie*, 286 U.S. at 290, 52 S.Ct. at 529). We affirm the Tax Court ruling on the tax treatment of participation interest.

III

Finally, the Tax Court determined that petitioner improperly received a $9,302 tax refund for the 1980 tax year and found that the Commissioner was "entitled to the asserted $9,302 increase in deficiency for such year." 91 T.C. at 1096. Petitioner argues that Commissioner failed to carry the burden of proof under Tax Court Rule of Practice & Procedure 142(a) to prove this added deficiency. We do not consider the burden of proof issue because, despite language in its opinion,[6] the Tax Court did not increase petitioner's deficiency.

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[6] We believe the Tax Court's language merely recognized that, based upon its holding that petitioner had a tax deficiency for 1980, any refund was erroneous and must be considered in the final tax liability calculation.

In the Rule 155 computation of petitioner's tax deficiency, adopted by the Tax Court in its final decision of July 20, 1990, the carry-back of net operating loss claimed in petitioner's amended tax return, I R. doc. 9, ex. A, was considered and in fact resulted in a decreased tax deficiency. It is unclear to us what petitioner complains of and what relief it seeks. If petitioner is arguing that we should not consider the information contained in the amended tax return, which the Commissioner relied upon in its amended answer, we would be required to increase petitioner's deficiency back to the original $156,858 claimed in the notice of deficiency, *see* I R. doc. 2, ex. A, and original answer, *see* I R. doc. 4, ¶2 & ex. A, instead of the $147,503 approved by the Tax Court in its decision. *See* I R. doc. 25; *see also* I R. doc. 20 at 3-4 (showing Commissioner's computations arriving at $147,503 amount). If petitioner is asking that we reject all the new allegations found in the amended answer, again we would be left with the original tax liability of $156,858. Petitioner surely would not have us increase the tax liability against it.

Petitioner argues in its reply brief in a footnote that "[a]lthough not material, the refund, in fact, has not been paid." Reply Brief for Appellant at 10 n.*. If petitioner has not received the tax refund amount, it should have raised the issue, at the latest, by objecting to the Rule 155 computation as inaccurate instead of filing a Notice of No Objection. *See* I R. doc. 24.

AFFIRMED.

RESALE MOBILE HOMES, INC., PETITIONER v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 39593-84. Filed December 21, 1988.

Petitioner, a Colorado corporation, was engaged in the business of selling new and used mobile homes at retail. Purchaser financing was provided by petitioner through arrangements with two finance companies. Pursuant to such arrangements, petitioner sold the consumer paper created from the credit sale to either of the finance companies, receiving in return the principal amount of the consumer paper plus participation interest based on the excess of the interest rate petitioner charged the purchaser over the rate the finance company charged petitioner. Prior to the years in dispute, the participation interest was held by the finance companies in a dealer reserve account and was paid to petitioner to the extent it was not required as security for petitioner's obligations under its agreement with the finance companies. As an accrual basis taxpayer, petitioner reported the amount held in the reserve account as income in the year of sale. In 1975, Colorado law was changed with respect to the prepayment of consumer paper. In response to the change in law, the provisions set forth in petitioner's consumer paper were changed. As a result, petitioner received the participation interest following the finance company's receipt of payment from the mobile home purchaser and reported the participation interest as received. *Held,* petitioner is required to report the entire participation interest in the year the consumer paper is sold to the finance company.

Robert Shaiman and *John D. Moats,* for the petitioner.

Barbara E. Horan, for the respondent.

JACOBS, *Judge:* Respondent determined deficiencies in petitioner's Federal income taxes in the following amounts:

TYE May 31–	*Deficiency*
1978	$ 9,289
1979	194,698
1980	156,858
1981	99,056

By its amended petition, petitioner claims entitlement to a refund of $3,015 as a result of a carryback (from its 1982 taxable year to its 1979 taxable year) of an investment tax credit. By his amended answer, respondent claims an increased deficiency in the amount of $9,302 with respect to petitioner's 1980 taxable year based on an allegedly erroneous refund to petitioner.

After concessions, the issues for decision are: (1) Whether petitioner correctly reported its entitlement to a portion of interest income to be collected under consumer installment contracts it sold to finance companies; (2) whether petitioner is entitled to an investment tax credit carryback from its 1982 taxable year to its 1979 taxable year; and (3) whether petitioner incurred an operating loss for its 1981 taxable year entitling it to net operating loss carrybacks to its 1978 and 1979 taxable years.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts and related exhibits are incorporated herein by this reference.

Petitioner, a Colorado corporation having its principal place of business located in Denver, was engaged in

the business of selling new and used mobile homes at retail under the name Mobile World. Petitioner reports its income using the accrual method of accounting.

When purchasing a mobile home on credit, the purchaser was required to sign a document, referred to as consumer paper, evidencing the purchaser's obligation to pay the balance due in installments, plus interest. The consumer paper was then immediately sold by petitioner to either of two finance companies, Midland Federal Savings & Loan Association of Denver (Midland) or Advance Mortgage Co. (Advance), which had agreed in advance to purchase the consumer paper and which thereafter collected the installment payments made by the purchaser of the home.

Upon the sale of the consumer paper to one of the finance companies, petitioner was entitled to receive not only the principal amount of the consumer paper, but also the excess (the participation interest) of the total amount of interest to be collected from the mobile home purchaser pursuant to the consumer paper over the total amount of interest the finance company charged petitioner (the buy rate). The interest rate petitioner charged the purchaser in the consumer paper was dictated by competition in the mobile home market; such rate was usually higher than the buy rate, resulting in participation interest being payable to petitioner.

Pursuant to its agreements with the finance companies, petitioner warranted, among other things, that the consumer paper sold complied with all Federal, State, and local laws; that it was free from all defenses, setoffs, and counterclaims; that petitioner had a valid first lien

against the mobile home sold; and that upon the finance company's purchase of the consumer paper, the finance company would have a valid first lien against the mobile home. In the event any of these warranties proved untrue, petitioner was obligated to repurchase the consumer paper with respect to which there was a breach of warranty.

Prior to the taxable years in dispute, Midland immediately paid petitioner the principal amount of the consumer paper purchased. The participation interest was retained by Midland in a reserve account. This reserve account served as security in the event one of petitioner's warranties to Midland was breached, which in fact never occurred.

Prior to the taxable years in dispute, the consumer paper (the old consumer paper) required the mobile home purchaser to pay a stated number of equal installment payments. Late payment did not vary the portion of each installment payment otherwise allocable to interest and principal. However, in the event the purchaser's installment payment was late, a delinquency charge was imposed; such charge was retained by Midland.

The precalculated participation interest was reduced only if the home purchaser prepaid the old consumer paper or if repossession in the event of default occurred (such events collectively referred to as a prepayment). In the event of prepayment, the unearned finance charge under the old consumer paper was calculated using the Rule of 78's.[1] Other than in the event of prepayment, the

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[1] The Rule of 78's is a method of allocating interest among time periods during the term of the loan. Under this method,

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exact amount of interest to be earned under the old consumer paper could be calculated at the time the paper was created and sold by petitioner to the finance company. Also, the exact participation interest, including the amount held back in the dealer reserve account, could be calculated at the time the consumer paper was sold to the finance company.

The transactions between petitioner and Advance prior to the years in dispute were similar to those between petitioner and Midland. However, when Advance purchased the consumer paper, it paid petitioner the principal amount of the consumer paper plus 50 percent of the participation interest. The balance of the participation interest was held in a reserve account which was paid to petitioner to the extent not required as security for petitioner's obligations.

Under its agreements with both Advance and Midland, petitioner's right to the participation interest was earned, and its right to receive the participation interest was fixed, at the time the consumer paper was sold.

Petitioner reported the entire participation interest received from Midland and Advance as income in the year in which the consumer paper was sold. In the event the mobile home purchaser prepaid the consumer paper,

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the amount of interest allocable to each time period is determined by multiplying the total interest payable over the loan term by a fraction (a) the numerator of which is the number of periods remaining on the loan at the time the calculation is made, and (b) the denominator of which is the sum of all time periods during the loan term.

petitioner claimed (in the year of prepayment) a deduction for the participation interest previously reported but not received due to the prepayment.

Under the terms of the agreements between petitioner and the finance companies in effect prior to the taxable years in dispute (the old financing agreements), each of the finance companies aggregated the balance due under all consumer paper purchased from petitioner as well as the total participation interest held back in the reserve account. Petition was entitled to monthly payment of that portion of the amount held in reserve which exceeded a percentage (3 percent with respect to Midland; 5 percent with respect to Advance) of the balance due under all consumer paper purchased from petitioner. Thus, since the amount payable to petitioner depended solely on the balance in the reserve account, petitioner received payment of the participation interest from the finance company prior to payment by the mobile home purchaser to the finance company.

On October 28, 1975, the Colorado statute regarding the calculation of the balance due on consumer paper in the event of prepayment (Col. Rev. Stat. tit. 5, pt. 2, sec. 210, (1973)) was amended to prohibit the use of the Rule of 78's in calculating such balance. The amended statute provided that after May 14, 1976, in the event the consumer paper was prepaid, the balance due was to be calculated using simple interest.

As a result of the statutory amendment, the agreements between the finance companies and petitioner were changed to reflect the fact that if the consumer paper were prepaid, the amount of interest deemed

earned would be substantially reduced. In addition, the terms of the consumer paper had to be changed (the new consumer paper).

The new consumer paper contained provisions requiring each payment made by the mobile home purchaser to be applied first to accrued interest through the date of payment and then to principal. Accrued interest was computed on a simple interest basis which was dependent upon the number of days between actual payments, rather than the due dates of such payments.

Since the amount of interest to be earned with respect to each payment was based upon the date payments were actually received rather than the dates they were due, after the change in the law, neither the total amount of interest to be earned under the new consumer paper nor the participation interest could exactly be determined in advance. However, both the amount of interest to be earned on each individual contract of new consumer paper and the participation interest could be reasonably estimated by using an amortization schedule which assumed that all required payments would be made every 30 days.

Under petitioner's agreement with Midland during the taxable years in dispute (the new Midland agreement), petitioner no longer received the participation interest in advance of payment by the mobile home purchaser; rather, it received the participation interest from the new consumer paper when Midland received the installment payments from the mobile home purchaser. When a payment under the new consumer paper was received, Midland would (a) calculate the amount of such

payment to be applied to accrued interest, (b) determine the amount of such interest to be retained by Midland (based upon the buy rate), and (c) determine the amount of the participation interest to be paid to petitioner. Midland would then pay petitioner the amount of participation interest so determined. A dealer reserve account was not established (although Midland had the option to do so), and there was no percentage ratio required to determine the extent by which petitioner was to receive payment with respect to the participation interest.

The agreement between Advance and petitioner during the taxable years in dispute (the new Advance agreement) provided that Advance would maintain a reserve account for petitioner. The participation interest was credited to this account and paid to petitioner over the life of the consumer paper.

Petitioner prepared a list of consumer paper sold to the finance companies setting forth the amount of participation interest it expected to receive if all the mobile home purchasers timely made all payments to maturity.

With respect to the new consumer paper, petitioner reported the participation interest as income as checks were received from the finance companies. Respondent determined that petitioner should have accrued all the participation interest in the year the new consumer paper was sold (on the theory that petitioner's right to receive such income was fixed and the amount was reasonably ascertainable). As a result of such determination, and his review of petitioner's financial statements[2] and its

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[2] In its financial statements, petitioner reported the finance income as an asset in an account entitled "Finance

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accountant's (Coopers & Lybrand's) workpapers, respondent claims petitioner understated its income as follows:

Petitioner's taxable year ended May 31-	*Petitioner's gross receipts as determined by respondent*	*Petitioner's gross receipts as reported by petitioner*	*Increase in petitioner's taxable income as determined by respondent*
1979	$4,262,512	$3,854,512	[3]$410,000
1980	4,599,073	4,249,073	350,000
1981	4,016,179	3,701,179	315,000

On its tax return for the taxable year ended May 31, 1981, petitioner claimed a $56,809 net operating loss, which it carried back to taxable years ended May 31, 1978, and May 31, 1979. Respondent disallowed the loss, and in turn the carrybacks, because of his determination that petitioner understated its income for its taxable year ended May 31, 1981.

On its tax return for the taxable year ended May 31, 1982, petitioner claimed entitlement to a $3,760 investment tax credit of which it used $745. Petitioner filed an amended return for its taxable year ended May 31, 1979, claiming a carryback of the unused amount of the investment tax credit, i.e., $3,015. Respondent's notice of deficiency disallowed the carryback.

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income included in uncollected finance contracts held by financing institutions"; there was also a contra liability account entitled "Unearned finance income."

[3] The apparent $2,000 discrepancy was not explained.

In December 1983, petitioner filed an amended return for its taxable year ended December 31, 1980, requesting a refund in the amount of $9,302; respondent issued a refund in the amount requested. Subsequently, respondent determined that the notice of deficiency did not take into account this refund. By an amendment to answer, respondent claims an increased deficiency for the $9,302 refunded.

At trial, respondent introduced, through a tax partner of Coopers & Lybrand, a copy of Coopers & Lybrand's audit workpaper entitled "Mobile World, finance income computation carryforward." The workpaper, dated September 10, 1980, was prepared by two individuals formerly employed by Coopers & Lybrand, in connection with the preparation of petitioner's financial statements for its year ended May 31, 1980. No one explained the computations set forth on the workpaper, and the auditor's note set forth thereon is not comprehensible due to the poor quality of the copy filed with the Court. Petitioner objects to the admission of the workpaper on the grounds of hearsay and relevancy. Respondent contends that the workpaper falls within the business records exception to the hearsay rule and is relevant. We did not use the workpaper in reaching our decision, hence we need not rule on petitioner's objection.

OPINION

The first issue for determination is whether petitioner properly reported the participation interest during the

taxable years in dispute. Section 446(a)[4] provides the general rule that:

Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.

Section 446(b) provides that if the method used by the taxpayer does not clearly reflect its income, the computation of such taxable income is to be made under a method which, in the opinion of the Secretary, clearly reflects income.

Section 451(a) provides the following:

The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period.

Under the accrual method of accounting, income is includable in gross income when all events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy. Secs. 1.451-1(a), 1.446-1(c)(1)(ii), Income Tax Regs.; *Spring City Foundry Co. v. Commissioner,* 292 U.S. 182, 184-185 (1934).

Section 446(e) provides "a taxpayer who changes his method of accounting on the basis of which he regularly computes the income in keeping his books shall, before computing his income under the new method, secure the

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[4] All section references are to the Internal Revenue Code of 1954 as amended and in effect during the years in dispute.

consent of the Secretary." A change in the method of accounting includes a change in treatment of any material item used in the overall plan. Sec. 1.446-1(e)(2)(ii)(a). Income Tax Regs. Further, the regulations provide that a change from the accrual method to the cash receipts and disbursement method is a change in accounting method. Sec. 1.446-1(e)(2)(ii)(a), Income Tax Regs.

Petition is and always has been an accrual basis taxpayer. Respondent contends that by reporting the participation interest as received from the finance company, rather than when the new consumer paper was sold, petitioner changed its method of reporting the participation interest from the accrual method to the cash receipts and disbursements method and that such change was both unauthorized and improper. Petitioner argues otherwise, claiming that until receipt, the participation interest was not fixed and determinable. We agree with respondent.

Under the accrual method of accounting, the inclusion of an amount in income is based on the *right to receive* the amount, *not the actual receipt* of the amount. When the right to receive the amount is fixed, and the amount can be determined with reasonably accuracy, the amount must be accrued into income. *Spring City Foundry Co. v. Commissioner, supra.* Here, petitioner's sale of the new consumer paper activated its right to receive the participation interest, even though payment of such interest was to be deferred.

We believe the rationale of *Commissioner v. Hansen,* 360 U.S. 446 (1959), is apposite to the instant case. In

Hansen, three accrual basis taxpayers (two retail automobile dealers and one trailer dealer) sold installment paper to finance companies, receiving a major percentage of the paper's face value from them. The finance companies retained an amount equal to the remaining percentage of the paper's face value in a dealer reserve account as security for payment of the dealer's contingent liabilities. The finance companies made payments to the dealers from the reserve account as the accumulated reserves exceeded a percentage of the unpaid balances on the installment paper.

The dealers argued that the existence of the reserves foreclosed their having a present and enforceable right to the payment of the income. The Supreme Court disagreed, stating that the right to presently recover the reserves was not the key to the accrual of income, but rather, it is the time of acquisition of the fixed right to receive the reserves, which the Court held occurred at the time of sale of the installment paper.

The dealers also argued that the reserves were subject to such contingencies that they could not have reasonably determined in the year of sale the amount of reserves they would ultimately receive. The Court disagreed with this argument, stating that since the amounts in the reserve accounts would either be paid to the dealers or applied to their obligations under their guarantees, the dealers in essence would "receive" the entire amounts in the reserve accounts in all events. In this regard, it is to be noted that in the instant case, the participation interest held in reserve would either be paid to petitioner in cash or applied to satisfy petitioner's obligations to the finance companies.

In the instant case, petitioner acquired a fixed right to receive the participation interest when it sold the consumer paper to the finance companies. While petitioner could not compel the finance companies to immediately pay over the participation interest, such is not the key to the accrual of income.

Petitioner argues that the instant case differs from *Hansen* because, under the arrangements between petitioner and the finance companies, there were no reserve accounts. We do not believe the creation of a reserve account is controlling. A reserve account is simply a bookkeeping entry. The finance companies intended to share the interest paid by the mobile home purchasers with petitioner; however, they obviously were unwilling to share interest which they did not receive due to the purchaser's default or prepayment. Economically, holding back payment to petitioner until such time as participation interest was received by the finance company served the same purpose as the creation of a reserve account.

Petitioner next contends that the amount of income they were to receive could not be determined with reasonable accuracy. While the word "accuracy" means exactness or precision, when modified by the word "reasonable" it implies something less than an exact or completely accurate amount. *George K. Herman Chevrolet, Inc. v. Commissioner,* 39 T.C. 846, 850 (1963).

An accrual basis taxpayer must report income in the year the right to such income accrues, despite the necessity for mathematical computations or ministerial acts. *George K. Herman Chevrolet, Inc. v. Commissioner, supra at*

850. In addition, where an amount of income is properly accrued on the basis of a reasonable estimate and the exact amount is later determined, any difference may be included in income or deducted, as appropriate, in the year in which the correct amount is determined. Sec. 1.451-1(a), Income Tax Regs.; *Continental Tie & Lumber Co. v. United States,* 286 U.S. 290 (1932).

In our opinion, the amount of deferred finance income payable to petitioner was capable of *reasonable* estimation at the time of sale of the new consumer paper. The amount of such income could be calculated through amortization tables, and we find persuasive that such calculation was in fact reflected in petitioner's financial statements. We recognize that there may be some variation in the final amounts received by petitioner due to the default of purchasers or other prepayment of the paper. However, this factor alone does not prevent petitioner from accruing the amount estimated. *Commissioner v. Hansen, supra.* We do not believe that any variance in amount, due to periodic or late payments, would be of such significance as to prevent petitioner from making a reasonable estimate of the amount to be received or that any errors in such estimation would stand incapable of correction in a later year. As such, we find that respondent properly computed petitioner's participation interest for the taxable years in dispute.

The next issue to be addressed is whether petitioner is entitled to an investment tax credit carryback in the amount of $3,015 from its 1982 taxable year to its 1979 taxable year. Petitioner bears the burden of proving entitlement to the investment tax credit. *Munford, Inc. v.*

Commissioner, 87 T.C. 463, 488 (1986), affd. 849 F.2d 1398 (11th Cir. 1988).

Other than a copy of its amended return for the fiscal year ended 1979, petitioner failed to produce any evidence from which it can be determined whether petitioner is entitled to the claimed investment tax credit carryback. Because of such failure, we are unable to ascertain whether an investment tax credit arose in 1982, and if so, whether it was actually of sufficient magnitude to permit a carryback. Accordingly, petitioner is not entitled to the claimed carryback.

The final issue is whether petitioner is entitled to net operating loss carrybacks from its 1981 taxable year to its 1978 and 1979 taxable years. Since the resolution of this issue is dependent upon the resolution of the first issue, i.e., the accrual of the participation interest issue, and since we sustained respondent's determination with respect to that issue, it follows that petitioner had no net operating loss for its 1981 taxable year available for carryback to its 1978 and 1979 taxable years.

Because we have resolved the issues in favor of respondent, the $9,302 refund with respect to petitioner's 1980 taxable year was erroneous. Accordingly, respondent is entitled to the asserted $9,302 increase in deficiency for such year.

To reflect concessions made by respondent,

Decision will be entered under Rule 155.